BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RYAN THORESON Claimant VS. **JAMES D. VAN BECELAERE CO., INC.** Respondent AND **CINCINNATI CASUALTY COMPANY** Insurance Carrier	)	Docket No. 1,054,040

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 6, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery. Patrick C. Smith of Pittsburg, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent.

The ALJ found claimant entitled to medical treatment with Dr. Lynn D. Ketchum until further order or until certified as having reached maximum medical improvement.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 28, 2011, Preliminary Hearing; the transcript of the November 5, 2012, Preliminary Hearing; the transcript of the May 24, 2013, Preliminary Hearing; the transcript of the February 28, 2014, Preliminary Hearing and the exhibits; the transcript of the January 29, 2014, evidentiary deposition of Dr. Lynn D. Ketchum and the exhibits; and the transcript of the November 11, 2013, evidentiary deposition of Joel Van Becelaere and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant's current injury is different than the initial injury and did not arise out of and in the course of his employment. Respondent maintains Dr. Ketchum's causation opinion and diagnoses are based upon a flawed and erroneous understanding

of claimant's job description. Therefore, respondent argues the ALJ's Order authorizing the treatment recommended by Dr. Ketchum should be reversed.

Claimant contends the Board lacks jurisdiction to hear this appeal as it challenges the ALJ's decision regarding authorization of medical treatment. Further, claimant argues respondent does not challenge the compensability of the claim, but whether certain medical treatment should be authorized as a result of the compensable injury. Claimant maintains Dr. Ketchum's opinion regarding the need for additional medical treatment is not controverted by any other medical testimony, and the ALJ's Order should be affirmed.

The issues for the Board's review are:

1. Does the Board have jurisdiction to hear respondent's appeal?

2. Did claimant's injury arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant was employed by respondent from July 1, 2005, through January 31, 2011, as a computer numerical control (CNC) operator. The CNC is a computerized engine lathe which turns machine parts according to a program. The job required claimant to first load a cast iron cylinder weighing approximately 20 pounds and measuring roughly 6 inches in diameter into a hydraulic chuck, and then press a foot pedal to activate a clamp while holding the cylinder in place. Claimant testified he pushed and turned the cylinder to lock it into place in the chuck. After loading the cylinder, claimant closed the CNC's sliding door and pushed a button to start the machining process. Once the machining process was complete, claimant would remove the semi-finished products and deburr them by use of a handheld deburring knife and a buffing wheel. The finished product was measured with calipers for quality control before claimant wrapped the parts in paper and loaded them into a box for shipping.

Joel Van Becelaere, respondent's vice president, testified the machining process took on average 25 minutes to complete, though the times varied from 16 to 35 minutes according to the complexity of the part. Mr. Van Becelaere stated that, of the 25 minutes, claimant would use his hands for 7.5 minutes, or roughly 30 percent of the time. The remaining time was spent watching the machine and ensuring it turned correctly. Claimant disputed Mr. Van Becelaere's testimony at preliminary hearing, stating the process took approximately 6 to 12 minutes to complete. Claimant testified in addition to operating the CNC, he was "inspecting, manipulating the part, packing them, putting rust inhibitor on

them, wiping it on with a rag, rolling them, and getting them ready for the shipping department."[1] Claimant stated he used his hands up to 50 percent of the time.

On July 11, 2010, claimant was sent to a sports medicine clinic by respondent after he injured his left carpometacarpal (CMC) joint while picking up a piece of steel. An MRI revealed severe osteoarthritis of the left first digit CMC joint, and claimant was referred to Dr. Clint Walker at Kansas City Bone & Joint Clinic, P.A. Claimant treated conservatively with Dr. Walker beginning September 2010. He continued to be symptomatic and eventually underwent an arthrodesis of the left CMC joint with plate and screw fixation in early 2011. Claimant continued to have pain following surgery. Dr. Walker suspected the pain was caused by a loosening of the plate and screws. Dr. Walker subsequently removed the hardware and performed a successful interposition arthroplasty. Claimant's left thumb improved, while his right thumb worsened over time. Dr. Walker performed a right thumb CMC fusion with distal radius bone graft in 2012. Claimant treated with Dr. Walker until January 31, 2013, at which time claimant was released at maximum medical improvement with no restrictions.

In an Order dated May 31, 2013, the court referred claimant to Dr. Ketchum for an independent medical evaluation (IME) to determine whether additional medical treatment was necessary. On August 8, 2013, Dr. Ketchum reviewed claimant's history and available medical records, though he noted he did not have claimant's prior operative reports. Dr. Ketchum took x-rays and performed a physical examination of claimant and determined claimant had "a trigger finger with obvious crepitus and intermittent locking of the left third digit."[2] During his physical examination, claimant also demonstrated pain and weakness on the right and tested positive for de Quervain's syndrome. Dr. Ketchum recommended Kenalog injections for the bilateral hands and wrists. Dr. Ketchum opined:

> It is my opinion, within a reasonable degree of medical certainty, that all of these problems are related to the heavy repetitive work that he has done at [respondent]. Prior to working there, he did work as a mechanic and an electrician for an irrigation company but had no problems with his upper extremities during that period. Restrictions at this time would be no repetitive gripping with either the right or left hand until these problems are addressed. I am not recommending surgery at this time. Dr. Walker, who did his previous three surgeries, would be the logical person to do the injections.[3]

After the IME, Dr. Ketchum reviewed Mr. Van Becelaere's deposition testimony and personally handled a cylinder such as claimant would manipulate during his employment

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[1] P.H. Trans. (Feb. 28, 2014) at 32.

[2] Ketchum IME (Aug. 8, 2013) at 1-2.

[3] *Id*. at 2.

with respondent. Dr. Ketchum revised his opinion and testified claimant's work with respondent "would be medium and on the borderline of repetitive."[4] The new information did not change his causation opinion. Dr. Ketchum stated that although claimant's trigger finger and de Quervain's diagnoses were not previously recorded, and although claimant had not worked for respondent for two and one-half years prior to the August 2013 IME, claimant's condition is compatible with the type of work he performed at respondent. Dr. Ketchum explained:

> The only thing I can say is that I've seen this many times that when an individual has a fairly significant problem with a lot of discomfort, that may overshadow other problems, and then when those are resolved, those lesser problems may come to light.[5]

PRINCIPLES OF LAW

K.S.A. 44-534a(a)(2) (Furse 2000) states, in part:

> A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2013 Supp. 44-551(l)(2)(A) states, in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44–534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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[4] Ketchum Depo. at 9.

[5] *Id*. at 19.

[6] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS

K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. K.S.A. 2013 Supp. 44-551(l)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues.

Respondent's appeal does not come within the jurisdictional requirements listed in K.S.A. 44-534a, including accidental injury, injury arising out of and in the course of employment, timely notice, timely written claim, and certain other defenses. In accordance with the Court of Appeals' decision in *Carpenter*,[8] the Board has held that the term "certain other defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[9] Respondent does not dispute the underlying compensability of the claim.

The issue whether a worker is entitled to medical compensation is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.[10]

CONCLUSION

The Board lacks jurisdiction to review respondent's appeal.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that respondent's appeal is dismissed for lack of jurisdiction. The Order of Administrative Law Judge Brad E. Avery dated March 6, 2014, remains in full force and effect.

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[7] K.S.A. 2013 Supp. 44-555c(j).

[8] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[9] *Id.*; see also *Williams v. Durham School Services,* No. 1,027,861, 2006 WL 3891445 (Kan. WCAB Dec. 22, 2006); *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2013 WL 3368492 (Kan. WCAB June 18, 2013).

[10] K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this _____ day of April 2014.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge